(2)

FILED
APR 16 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

A. B. GOCHENOUR, *et al.*,
Petitioners,
v.
GEORGE AND FRANCES BALL FOUNDATION, GEORGE A. BALL AND F. B. BERNARD,
Respondents.

No. 872

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
EVERETT WARNER,
Counsel for Respondents.

THOMPSON, O'NEAL & SMITH,
1350 Consolidated Building,
Indianapolis, Indiana,

WARNER, CLARK & WARNER,
Muncie, Indiana,

Of Counsel.

Mark Gray Co., Printers, Indianapolis, Ind.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Summary of Argument	2, 3
Facts	3-7
Argument	8-26
Petitioners not real Parties in Interest	8-12
Right to sue is in Debtor	12-18
Prohibited interference with Administration of Estate	18-22
Plaintiffs' cases	22-24

TABLE OF CASES

	Page
Babbitt v. Read (C. C. A. 2), 236 F. 42	22
Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 125, 126, 84 L. ed. 110, 125	12-15-19
Conway v. Bonner (C. C. A. 5), 100 F. 2d 786	24
Diversey Bldg. Corp. (C. C. A. 7), 86 F. 2d 456	23
Glenny v. Langdon, 98 U. S. 20, 25 L. ed. 43	15
Gochenour et al. v. Cleveland Terminals Building Co., (C. C. A. 6)	21-22-24-25
Gochenour v. Morgan Co., 111 F. 2d 378 (C. C. A. 6)	16
Harwood v. U. S. Shipping Board (C. C. A. 2d), 32 F. 2d 680	23
Heffron v. Duggins et al. (C. C. A. 9), 115 F. 2d 519	11
Hirschfeld v. McKinley (C. C. A. 9), 78 F. 2d 124	22
In re Greyling Realty Corp. (C. C. A. 2), 74 F. 2d 734	12-18
In re: 7000 *South Shore Drive Bldg.* (C. C. A. 7), 86 F. 2d 499	12-19
Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 75 L. ed. 645	12
Lewis v. Council (D. C. N. Car.), 291 Fed. 148	13
Moyer v. Dewey, 103 U. S. 301, 26 L. ed. 39	21
Seminole Securities Co. v. Southern Life Insurance Co. (D. C. N. Car.), 182 F. 85	17
Tamm v. Ford Motor Co. (C. C. A. 8), 80 F. 2d 723 726	10
Taylor v. Sternberg, 293 U. S. 470, 79 L. ed. 599	14
Trimble v. Woodhead, 102 U. S. 647, 26 L. ed. 290	15
1775 *Broadway Corporation* (C. C. A. 2), 79 F. 2d 108	23

TEXTS

Page

Glenn, Liquidation (1935), Sec. 334 12

Gerdes, Corporate Reorganizations, Chap. 9 12

Statutes

Section 110, Title 11, United States Code 9-10

Section 588, Title 11, United States Code 9

Section 207 (c), Title 11, United States Code 9-10-13

ABBREVIATIONS

A. B. Gochenour and others who were plaintiffs below will be referred to as "Petitioners";

George and Frances Ball Foundation, George A. Ball and F. B. Bernard will be referred to collectively as "Respondents";

The Cleveland Terminals Building Company will be referred to as "Terminals";

Midamerica Corporation will be referred to as "Midamerica";

O. P. Van Sweringen and M. J. Van Sweringen, will be referred to as "Van Sweringens";

J. P. Morgan & Company will be referred to as "Morgan";

Vaness Corporation will be referred to as "Vaness";

Section 77-B of the Bankruptcy Act will be referred to as "Section 77-B".

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

A. B. GOCHENOUR, *et al.*,
Petitioners,
v.
GEORGE AND FRANCES BALL FOUNDATION, GEORGE A. BALL AND F. B. BERNARD,
Respondents.
No. 872

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

OPINIONS BELOW

The United States Circuit Court of Appeals for the Seventh Circuit rendered an opinion on January 21, 1941 (R. p. 70) 117 F. 2d 259.

The District Court filed a memorandum opinion which is reported in 35 F. Supp. 508 (R. p. 42-60).

JURISDICTION

Petitioners seek to invoke jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by

the Act of Congress of February 13, 1925 (43 Stat. 1939, 28 U. S. C. 47).

SUMMARY OF ARGUMENT

I.

The Cleveland Terminals Building Company is in reorganization in the District Court for the Northern District of Ohio, and the debtor was continued in possession. The petitioners are creditors of the corporation. Petitioners' complaint below charged a conspiracy by the respondents, who were neither officers nor directors, with others, to acquire collateral deposited by the corporation as security for the corporation's note, at a nominal and grossly inadequate consideration.

The cause of action sought to be asserted by petitioners, if one exists, which we deny, is an asset of the bankruptcy estate, and the debtor in possession is the real party in interest.

If there were a conspiracy by the respondents with others, as is alleged, fraudulently to procure this collateral, it was a wrong against the corporation, the right to the redress of which would lie with the corporation and would pass to the trustee in bankruptcy, i. e. the debtor in possession.

II.

Terminals, as is shown by the face of the complaint, was then, and is now, under the jurisdiction of the United States District Court for the Northern District of Ohio, Eastern Division (R. p. 2) in a proceeding pending therein for re-

organization under Section 77-B. By order of the District Court the debtor was continued in possession of its property. The right to sue for the alleged misappropriation of corporate property is vested solely with such corporation, it being the debtor in possession and standing in the place and stead of an ordinary bankruptcy trustee.

III.

The United States District Court for the Northern District of Ohio, Eastern Division, in which reorganization proceedings of Terminals under Section 77-B are pending, has exclusive jurisdiction over all of the assets of the bankrupt. The maintenance of this action by petitioners in the United States District Court for the Southern District of Indiana, is a prohibited interference with the orderly and proper administration of the bankrupt estate.

Once the property of a bankrupt is in the hands of the court, private rights in respect thereto are subject to the superior dominion of the court and are to be adjudged pursuant to the standards prescribed by the Congress.

The petition for the writ should be denied.

STATEMENT OF FACTS

The absence of an adequate accurate statement of the facts in the petition requires a brief statement by respondents.

Petitioners filed a complaint in the United States District Court for the Southern District of Indiana. Respondents moved to dismiss the complaint. (R. p. 9, 10.) Petitioners then filed an amendment to their complaint. (R.

p. 11, 12.) Respondents then moved to dismiss the complaint as amended (R. p. 12, 13.) Respondents filed an affidavit (R. p. 14) with certain exhibits thereto attached. (R. p. 17-34.) Petitioners and Respondents stipulated that such affidavit, with exhibits, A. B. and C attached, could be considered by the Court "in its consideration and ruling upon defendants' motion to dismiss plaintiffs' complaint." (R. p. 36.)

Petitioners filed a supplemental amendment to their complaint. (R. p. 36-38.) The Court sustained the Repondents' motion to dismiss the complaint as amended and supplemented. (R. p. 42.) A memorandum opinion was filed by the District Court (35 F. Sup. 508; R. 42-60.)

An appeal was taken by petitioners to the United States Circuit Court of Appeals for the Seventh Circuit which affirmed the District Court (117 F. 2d 259; R. 70).

Petitioners who are non-residents of Indiana, brought this class suit for themselves and other creditors of Terminals.

The complaint alleges in substance that:

(a) Terminals is in reorganization under 77B in the United States District Court in Ohio and was continued in possession of its property; petitioners are general creditors and their claims have been allowed; the action is brought on behalf of all creditors of Terminals as a class (R. p. 2, 3).

(b) In 1930 Terminals executed a collateral note and delivered the note and collateral to Vaness, which in turn delivered the Terminals note with collateral, together with

a note of its own, to Morgan; that during August, 1935, and subsequently Terminals was insolvent. (R. p. 3).

(c) Van Sweringens and Charles L. Bradley were officers and directors of Terminals; that they conspired with respondents Ball and Bernard to acquire the collateral for a nominal and grossly inadequate consideration; that pursuant to the conspiracy Midamerica Corporation was formed; that Van Sweringens and Bradley were elected officers on September 30, 1935, prior to the time fixed for the sale of the collateral; that O. P. Van Sweringen was authorized by Midamerica to purchase the collateral; that the collateral was purchased at the Morgan sale and Midamerica realized an immediate profit (R. p. 5).

(d) That the Van Sweringens and respondents Ball and Bernard agreed that the Van Sweringens were to receive 55% of the voting rights of the outstanding common stock of Midamerica under a ten-year option to purchase which expired with the Van Sweringen's death. (R. pp. 5, 6).

(e) That respondent Ball acquired 93.67% of the capital stock of Midamerica. It was thereafter transferred by him without consideration to respondent George and Frances Ball Foundation which he and respondent Bernard had organized. (R. p. 6).

(f) That on May 4, 1937, the assets of Midamerica were sold and the cash realized therefrom was distribuflted to Midamerica stockholders; that respondents should account for the sums distributed. (R. p. 7); that a receiver be appointed during pendency of cause.

(g) Petitioners filed suit in the District Court in

Ohio against Ohio residents; that it is necessary to sue respondents in Indiana to obtain personal judgment.

The amendment to petitioner's complaint (R. p. 11) alleges in substance that:

(a) The suit in Ohio is based on the same cause of action as this suit; Terminals was not made a party to the Ohio suit due to pendency of reorganization under 77B but that it should be joined as plaintiff or defendant; that a motion was made in the 77B proceedings for leave to join Terminals as plaintiff or defendant; that the matter was referred to a master who rendered his report that Terminals was "neither a necessary, indispensable or proper party" and the leave should be denied; that the court approved the report of the Master.[1]

(b) That Van Sweringen Corporation recovered a claim in excess of $27,000,000; that it knew all of the facts and thus is in a different class than petitioners; that Morgan recovered a claim in excess of $27,000,000; that it actually participated in the sale of the collateral, thus is in a different class than petitioners. (R. p. 12).

To the complaint as amended the respondents separately

---

[1]The affidavit with attached exhibits A. B. and C (R. pp. 14-34) show that the recommendation of the Master was as follows: "For the reason that the petition does not allege, and no evidence has been adduced, that Subsidiary Debtor (Terminals Company) is either a proper, necessary or indispensable party in cause No. 19982, pending in the District Court ofthe United States for the Northern District of Ohio, Eastern Division. It is respectfully recommended that the petition herein be denied." (R. p. 26).

The order of court approving the Master's recommendation is based on the Master's reasons that the petition did not allege nor was there evidence adduced that Terminals was either a proper, necessary or indispensable party. (R. p. 9).

filed a motion to dismiss petitioners complaint as amended because it failed to state a claim on which any relief could be granted to the petitioners. The motion assigned the following reasons:

1. It appears from the averments of the complaint as so amended that the plaintiffs (petitioners) are not the real parties in interest.

2. It appears from the averments of the complaint as so amended that the plaintiffs are creditors of the Cleveland Terminal Buildings Company. The complaint as amended further alleges that said company is now under the jurisdiction of the District Court of Ohio in a reorganization proceeding pending under Section 77B and is in possession of its property by the order of the Court. Under the terms of the Act when a debtor is left in possession of its property in a reorganization proceeding it is vested with the same title as a Trustee in Bankruptcy would have had if one had been appointed. Terminal is, therefore, the only person who can maintain an asserted cause of action like that set forth in plaintiff's complaint. Such right to sue is vested solely in Terminal and plaintiffs have no right to maintain this action.

3. Under the provisions of the Bankruptcy Act when a reorganization proceeding is pending the court in which it is pending has jurisdiction of all assets of the bankrupt and of all claims, debts and demands due the bankrupt. The plaintiffs are therefore not entitled to maintain this action because it results in an interference with the orderly and proper administration of the bankrupt estate.

ARGUMENT.

Petitioners contend that the right of action for the alleged conspiracy by respondents with others in purchasing the collateral of the debtor does not pass to the trustee, i. e. the debtor in possession.

Petitioners assert that the decision in the instant case is in conflict with decisions of the Circuit Courts of Appeal in the Second, Fifth, and Ninth Circuits. It is also contended that the instant decision conflicts with a prior decision by the same court.

I.

The complaint shows on its face that petitioners are not the real parties in interest.

The cause of action sought to be asserted by petitioners, if one exists, is an asset of the bankruptcy estate, and the debtor in possession is the real party in interest.

It is averred that Group 3 of the collateral purchased by Midamerica was deposited under Terminals note (R. p. 4) and that Terminals delivered its note and collateral to Vaness (R. p. 3). Vaness delivered the Terminals note and collateral (with another note) to Morgan.[2] Thus the collateral securities which were purchased by Midamerica was the property of Terminals and not the property of petitioners. If there were a conspiracy by the respondents

---

[2] It is averred that the notes were delivered to Morgan at the direction of defendants, the officers of said companies. (R. p. 3.) The defendants were not officers of either Terminals or Vaness nor does the complaint so allege other than in this instance.

with others, as is alleged, fraudulently to procure this collateral, it was a wrong against Terminals.

The right of action to redress the wrong would therefore lie with Terminals. Hence, if a right of action such as this passes to a trustee in bankruptcy, i. e., a debtor in possession, these plaintiffs are not the real parties in interest. Such is the applicable law.

Section 207 (c), Title 11 U. S. C. provides in part:

> "Upon approving the petition (for reorganization) . . . . the judge . . . . (1) may, ... temporarily continue the debtor in possession or appoint a trustee or trustees of the debtor's estate . . . . (2) . . . . every such trustee . . . . shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all the powers of a trustee appointed pursuant to section 72 of this title, and if authorized by the judge, the same powers as those exercised by a receiver in equity to the extent consistent with this section . . . ."

Sec. 588, Title 11 U. S. C. provides that a debtor continued in possession, as is Terminals, shall have all the title, be vested with all of the rights and exercise all of the powers of a trustee appointed under the Bankruptcy Act.

Section 110 of Title 11 U. S. C. provides in part:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification . . . . shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all . . . .
>
> 6. Rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

The cause of action sought to be asserted here is within the language of Sec. 110, Title 11, U. S. C. a "right of action arising from the unlawful taking or detention of or injury to" property of Terminals. Under the provisions of Section 207 (c), Title 11, U. S. C., the right of action, if any existed, passed to the debtor in possession which stands in the place of a trustee.

In *Tamm v. Ford Motor Co.* (C. C. A. 8), 80 F. 2d 723, 726, an action was brought by Tamm as a trustee in bankruptcy of Herb Ford, Inc., for damages arising out of certain false statements and inducing misrepresentations of defendant. Appellee contended that the trustee in bankruptcy, had no right to sue because the title to the chose in action did not vest in him for the reason that a trustee in bankruptcy does not take title to an action for fraud and deceit. The Court said:

> "We think Congress intended to deal fully with the title to choses in action by what it said in subdivision (6), *supra*, (Sec. 110, Title 11, U. S. C. A.) which confers title on the trustee in bankruptcy to 'rights of action arising upon contracts or from the unlawful taking or detention of or injury to his property.'
>
> "Does the cause of action here come within the language of subdivision (6), *supra*? * * * It is settled, of course, that a right of action for a purely personal tort, as for example, for damages for a personal injury, or libel, or slander, does not pass to the trustee. * * * We have not found, nor has the diligence of counsel found for us, any federal cases except *In re Gay* (D. C.), 182 F. 260, and *In re Harper* (D. C.), 175 F. 412, in which the troubling point has been passed on squarely and in favor of the trustee's title. * * * But it seems to us that the reason of the thing and the language used in subdivision (6), *supra*, largely favor the view taken

by the two District Courts in the Gay and Harper cases, *supra*, * * *

> Another clause of subdivision (6), *supra*, vests title in the trustee to rights of action arising from 'injury to his property,' i. e., the bankrupt's property. * * * And if Congress used the word 'injury' in its meaning in law, it means 'an actionable wrong', that is, an actionable wrong to property, in the abstract. * * * Surely Congress never intended that a bankrupt could lose his property to the extent of utter insolvency as here pleaded, and then go into bankruptcy for an immunity bath, and then emerge freed from his creditors and vested with all he had lost. For if the trustee has no title and therefore no right to sue, obviously, the bankrupt retains the title to the chose and may sue (*First National Bank v. Lasater*, 196 U. S. 115, 25 S. Ct. 206, 49 L. ed. 408), and the action here must then be allocated to the category of a personal injury to a corporation. We are therefore constrained to follow the cases of *In re Gay* and *In re Harper*, both *supra*, and hold that the trustee in bankruptcy took title to the chose in action here and that he had the right to bring and maintain this suit."

(Compare *In re Bothe* (C. C. A. 8), 173 Fed. 597, 600.)

Heffron v. Duggins, et al. (C. C. A. 9), 115 Fed. 519, 520.

The collateral deposited with Morgan as security for the note was the property of Terminals and remained the property of Terminals until sold by Morgan pursuant to the terms of the note and upon default in payment thereof. If the note had been paid when it fell due, there would have been no necessity for resort to the collateral and in that event the collateral security would have been returned to Terminals as its property. Thereafter, if Terminals had filed its petition under Section 77B, it cannot be gainsaid that said collateral would then be property of the estate, the title to which would have passed to the debtor in possession.

These plaintiffs now seek not the collateral but a money judgment representing such collateral less the price paid by Midamerica. Clearly the alleged injury was an injury to Terminals property. The right of action for such alleged injury lies with Terminals alone. Any right in or to the collateral which these plaintiffs may have is a derivative right flowing to them through Terminals as its creditors.

That the title and right to possession of all property owned and possessed by the bankrupt vests in the trustee is clearly settled and the bankruptcy court has exclusive jurisdiction to deal with the property of the bankruptcy estate.[3]

The petitioners are not the real parties in interest so as to successfully maintain a cause of action such as they have asserted.

II.

Terminals, being now under the jurisdiction of the United States District Court in Ohio, (R. p. 2) in a reorganization proceeding under Section 77B, and being in possession of its property by order of that Court, the right to sue for the alleged misappropriation of corporate property is vested solely in the debtor in possession which stands in the place of an ordinary bankruptcy trustee.

As has been pointed out, a debtor in possession by

---

[3] *Case v. Los Angeles Lumber Products Co.*, 308, U. S. 106, 125, 126, 84 L. ed. 110, 125 (see also foot note 22, p. 125).

Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 737, 75 L. ed. 645, 661, 662.

In re Greyling Realty Corporation (C. C. A. 2), 74 F. 2d 734, 736.

Glenn, Liquidation (1935) Section 334.

Gerdes, Corporate Reorganizations, Chap. 9.

7000 South Shore Drive Bldg. (C. C. A. 7), 86 F. 2d 499.

Section 207 (c) Title 11, U. S. C. is vested with the title to the bankrupt's property exactly as a trustee is under the old bankruptcy section 110 (6), Title 11, U. S. C.

In *Lewis v. Council* (D. C. N. Car.), 291 Fed. 148, 157, it was said:

> "By section 70, Bankruptcy Act (Comp. St. Sec. 9654), the trustee of a bankrupt, either personal or corporate, is 'vested by operation of law with the title of the bankrupt, as of the date he (or it) was adjudged * * * to all * * * rights of action arising upon contracts * * * or injury to, his (or its) property.'

"In *Trustee, etc v. Bossieux,* 3 Fed. 817, District Judge Hughes (E. D. Va.) held that the trustee in bankruptcy was vested with the right to bring suit in equity against the directors of a bank in bankruptcy to recover losses incurred by the gross negligence of such directors.

* * *

"The basis upon which suits by trustees in bankruptcy or receivers of insolvent corporations are sustained is that the assets of such bankrupts or insolvent corporations are trust funds to be administered by the court for the benefit of all of the creditors and stockholders. This includes rights of action for the recovery of such assets as may have been lost, misapplied, or wasted by the officers of corporations.

* * *

"In *Kelly v. Dolan* (C. C. A. 3d Cir.), 233 Fed. 635, 147 C. C. A. 443, it was held that when a corporation is injured

through the negligence of its directors, the right to recover for such negligence is vested in the corporation. It appearing that a receiver had been appointed of the property of the insolvent corporation, the bill brought by the stockholders was dismissed.

"In *Klein v. Peter* (C. C. A. 8th Cir.), 284 Fed. 797, Keyon, Circuit Judge, said:

> 'The property of the corporation, which would include claims of action on behalf of the corporation is in possession and custody of the court, held by the receiver as an officer of the court, * * * the right of action by the receiver * * * is exclusive.' *Klein v. Peter* (C. C. A. 9th Cir.), 286 Fed. 362."

Compare: *Central Hanover Bank & Trust Co. v. Philadelphia & Reading Coal & Iron Co., et al.* (C. C. A. 3), 99 F. 2d 642, 645, 646; *Taylor v. Sternberg,* 293 U. S. 470, 472, 79 L. ed. 599, 602.

In *Gross v. Irving Trust Company,* 289 U. S. 342, 344, 77 L. ed. 1243, 1244, the Court said:

> "Upon adjudication of bankruptcy title to all the property of the bankrupt wherever situated vests in the trustee as of the date of filing the petition in bankruptcy. The bankruptcy court has exclusive jurisdiction, and that court's possession and control of the estate cannot be affected by proceedings in other courts, state or federal. * * * Such jurisdiction having attached, contrary to the administration of the estate cannot be surrendered even by the court itself. * * * 'The filing of the petition is a caveat to all the world and in fact an attachment and injunction.'"

Before the enactment of Section 77B there are many

cases which announce the rule that after the adjudication in bankruptcy and the appointment of a trustee, no creditor has the right to institute legal proceedings to set aside a transfer or conveyance alleged to have been fraudulent as that right pertains to the trustee alone.

Glenny v. Langdon, 98 U. S. 20, 25 L. ed. 43;
Trimble v. Woodhead, 102 U. S. 647, 26 L. ed. 290.

In *Case v. Los Angeles Lumber Products Co.,* 308, U. S. 106, 125, 84 L. ed. 110, 125, this Court said:

> "Once the property is in the hands of the court private rights as respects that *res* are subject to the superior dominion of the court and are to be adjudicated pursuant to the standards prescribed by the Congress. As a result of such proceedings the hand of all *executions or levies may be stayed.* The court acquires '*exclusive jurisdiction of the debtor and its property wherever located for the purposes of this section.*' The court need not keep the debtor in possession but may substitute for the old management a trustee; or if the old management is retained it operates the business 'subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as the judge may from time to time impose and prescribe.' Thus, while the property remains in the hands of the court, as it does until dismissal or final decree on confirmation, the debtor, though left in possession by the judge, does not operate it, as it did before the filing of that petition, unfettered and without restraint. The control of the court is then pervasive." —(our emphasis).

In the amendment to their complaint (R. p. 11) petitioners assert they are in a special class distinct from the Van Sweringen Corporation and Morgan, two other creditors of Terminals, because both had participated or were parties to the acquisition of the property by Midamerica.

The conclusive answer to this assertion is that the District Court in Ohio having jurisdiction of the debtor, has not placed the petitioners and those for whom they sue, in a separate class. Orderly administration under 77B requires that the bankruptcy court have *exclusive* jurisdiction of the classification of creditors.

In *Gochenour v. Morgan Co.*, 111 F. 2d 378 (C. C. A. 6), while holding that portion of the claim in the amount of $5,000,000 is secondary to the rights of other creditors of Terminals, the Court of Appeals affirmed the allowance of the balance of a claim of J. P. Morgan & Co. as against this debtor in the amount of $22,000,000 as a general creditor. The bankruptcy court has heretofore classified the creditors and taken preliminary steps looking toward ultimate distribution of the assets. The District Court of Indiana, if it assumes jurisdiction of petitioners' action and adjudicates the alleged cause of action sought to be asserted, would have to pass upon the validity of the action of the bankruptcy court in the classification of creditors. If a recovery were to be had by petitioners in this asserted cause of action, any sums recovered would have to be distributed by the District Court of Indiana, thus usurping the function of the bankruptcy court. Either to classify the creditors or to make distribution of assets would nullify the action of the bankruptcy court and overturn or disregard the classification of the creditors made by such court.

The contentions of petitioners in their complaint will not withstand analysis. In their original complaint they say they "are general creditors together with other general creditors of the Terminals Company * * *" (R. p. 2). On November 16, 1939 (R. p. 10), after respondents' motion to dismiss had been filed on October 27, 1939 (R. p. 9), petitioners filed an amendment to their complaint (R. p. 11).

In substance the amendment alleged that the Van Sweringen Corporation (R. p. 11) and J. P. Morgan & Co. (R. p. 12) stood in a different class than petitioners because both companies had participated or were parties to the acquisition by Midamerica of the property.

The fact that the amendment was made was a recognition by petitioners that any suit which was brought on behalf of the general creditors of the debtor must necessarily be brought by the debtor and the attempt was to create a special class which petitioners could represent.

Petitioners efforts to create this special class by excluding J. P. Morgan & Company and the Van Sweringen Corporation from participation in any recovery which might be made in this case must fail for two reasons:

> First. The Ohio Bankruptcy Court has held that Morgan & Company and the Van Sweringen Corporation are general creditors with large claims which have been allowed and that court only can determine who shall participate in funds of the bankrupt.
>
> Second. A "class" must have some general characteristics in common. In many cases reference is made to a class suit as one "in which one or more members of a numerous class having a common interest may sue in behalf of themselves and all other members of the class. * * * Such suits are sometimes called 'creditors' suits' and sometimes * * * 'stockholders' suits'." *Seminole Securities Co. v. Southern Life Insurance Co.*, (D. C. N. Car.) 182 F. 85, 96.

Notwithstanding the averments of the complaint as amended it is still clear that not only petitioners but J. P. Morgan & Company and the Van Sweringen Corporation are *general creditors* of the bankrupt. They thus

have a common characteristic and the claim that J. P. Morgan & Company and the Van Sweringen Corporation are estopped to participate in the distribution of the fund merely presents a question of whether one member of the class because of individual action on his part has forfeited his right to participate in a fund. He still remains a general creditor and between him and petitioners there is no legal difference of position.

Petitioners seek to bring a "class suit" for the general creditors of Terminals. The right of action which they seek to assert, if any exists, is a corporate asset and belongs now to the trustee (the debtor in possession).

III.

The District Court of the United States in Ohio, in which reorganization proceedings of Terminals under Section 77B are pending, has jurisdiction over all of the assets of the bankrupt and the maintenance of this action by petitioners in the Indiana District Court is a prohibited interference with the orderly and proper administration of the bankrupt estate.

As has been pointed out in the case of *In re Greyling Realty Corporation,* (C. C. A. 2) 74 F. 2d 734, 736:

> "The apparent purpose of Section 77B of the Bankruptcy act, which provides for proceedings in the reorganization of a corporation and its subsidiaries, is to avoid immediate liquidation of the properties involved and to rehabilitate rather than liquidate * * * Section 77B was planned to bring such proceedings within the paramount and exclusive jurisdiction of one bankruptcy court. It was intended to provide a centralization of administration. * * * Indeed one of the principal reasons given for the enactment of Section 77-B was

> to eliminate the necessity of costly ancillary proceedings."

In *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, 84 L. ed. 22, 34:

> "Once the property is in the hands of the Court private rights as respects that *res* are subject to the superior dominion of the court and are to be adjudicated pursuant to the standards prescribed by Congress. * * * The Court acquires 'exclusive jurisdiction of the debtor and its property wherever located for the purposes of this section'."

In the administration of such a statutory plan as lies behind the purpose for the enactment of Section 77B the whole purpose of the Congress would be defeated if creditors such as petitioners assert themselves to be, could resort to courts other than the bankruptcy court for the recovery and distribution of assets. Nothing but chaos and confusion in the administration of the estate could result from a pursuance of the unauthorized course which petitioners are attempting to pursue.

In the case of *In re 7000 South Shore Drive Building Corporation*, (C. C. A. 7) 86 F. 2d 499, 501, it is said that:

> "True it is that, upon the filing of the petition under section 77B the approval of the same, exclusive and paramount jurisdiction over the *res* of the estate passed to the court of bankruptcy, which thereafter had the unimpeded right—indeed, the obligation—to draw unto itself the power of disposition of all controversies relating thereto. *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734, 51 S. Ct. 270, 75 L. ed. 645; *In re Sterba*, 74 F. (2d) 413 (C. C. A. 7); *Gross v. Irving Trust Co.*, 289 U. S. 342, 53 S. Ct. 605, 77 L. ed. 1243, 90 A. L. R. 1215. This power being vested exclusively in the national courts, under the grant from the states in the Federal Consti-

> tution, those courts may not be impeded or interfered with in discharging their duties pursuant to legislation enacted by Congress under the bankruptcy power, in respect to anything pertaining to the administration of the assets."

The chaotic condition of the administration of the bankruptcy estate cannot be over-estimated if creditors such as petitioners are permitted to maintain actions after a debtor corporation has taken steps under Section 77B to reorganize. In the instant case petitioners asked for the appointment of a receiver during the pendency of the cause and to take charge of all the property belonging to the trust estate. Petitioners, so the complaint alleges, have already filed their claims in the reorganization proceedings and such claims have been allowed. (R. p. 2). The District Court in Indiana could not know the extent of the claims except in so far as the complaint alleges. It is at once apparent that the Indiana District Court does not have authority to classify the creditors of Terminals which is in reorganization proceedings in the United States District Court in another state, nor has it authority to distribute proceeds of any recovery that might be made. The bankruptcy court is the proper one to classify the creditors and distribute the assets. To avoid such a chaotic administration as would ensue, the Congress has given to the bankruptcy court exclusive jurisdiction over the assets of the estate wherever they may be found, and has given it the sole and exclusive authority to make distribution of such assets as such bankruptcy court shall direct.

No question is presented here respecting the abandonment by the trustee of any cause of action against these respondents which it might have. No allegation is made that the trustee has either failed or refused to bring an action such as is asserted by petitioners. However, even though

the trustee, i. e., the debtor in possession, had refused or failed, such right would not by reason therof pass to petitioners.

In *Moyer v. Dewey,* 103 U. S. 301, 26 L. ed. 39 it was pointed out that the refusal or failure of a trustee in bankruptcy to sue for the avoidance of an alleged fraudulent conveyance within the time prescribed by law or at all, does not transfer the right to any creditor or to the creditors generally or authorize them to sue in their own behalf.

The remedy of creditors who are dissatisfied with refusal or inactivity of the trustee is to apply to the court of bankruptcy for an order directing the trustee to institute the necessary proceeding. If the court is satisfied that such action should be taken and will probably result in benefit to the estate, it has power to require the trustee to proceed.

In *Gochenour et al v. Cleveland Terminals Building Co.* (C. C. A. 6) decided March 3, 1941, it was pointed out that it is not the purpose of the Act to furnish immunity to wrongdoing by corporate officers, but that, on the contrary, it was the plain duty of the court to direct the investigation of all substantial allegations for mismanagement or fraud, and that "under the Act, if a corporate debtor is continued in possession of its assets, the judge may at any time, appoint a disinterested person as an examiner to perform the duties imposed upon a trustee * * *.

"The remedy of a creditor, if aware of the existence of property or credits which should readily go to the debtor for the benefit of creditors, is to inform the court of the facts and request that the trustee or debtor be required to proceed by suit, if necessary, to recover the property. *Trimble v. Woodhead,* 102 U. S. 647, 650."

The Congress foresaw the probable results of such haphazard administration of bankruptcy estates. It thus gave to bankruptcy courts the exclusive jurisdiction over the assets of a bankruptcy estate wherever they may be found.

The settled law is against the petitioners.

IV.

On the propositons on which this case was decided and appearing hereinabove there is no conflict among the decisions of the various circuit courts of appeal as is asserted by petitioners. None of the cases relied on by petitioners (pet. p. 7) hold contrary to the principles asserted here as we show:

In *Hirschfeld v. McKinley* (C. C. A. 9), 78 F. 2d 124, it was pointed out that if any creditor of the Drug Company in reorganization had been defrauded by the misrepresentation of the real capital of the company, the wrong done to him cannot entitle the entire body of creditors who have not suffered from the fraud to recover from the entire body of stockholders who took no part in the fraud. No such case is presented here. Petitioners and those for whom they sue are all general creditors.

> See *Gouchenour et al. v. The Cleveland Terminals Building* Co. (C. C. A. 6) (Decided Mar. 3, 1941).

In *Babbitt v. Read* (C. C. A. 2), 236 F. 42, certain bondholders claimed to have been defrauded by misrepresentations of stockholders. The court pointed out that it was only such defrauded purchasers "and not the trustee, who have the right to assert such a claim." The alleged fraud in the instant case was against Terminals.

In *Harwood v. U. S. Shipping Board* (C. C. A. 2), 32 F. 2d 680, Topping Brothers sought to intervene in a trustee's suit to set aside a contract of settlement between the bankrupt corporation and another. It was pointed out that Topping Brothers did assent to the lifting of a state court receivership which permitted the contract of settlement to be made. The Court said:

> "But, since its indebtedness had not been paid, it is still a creditor, whose interest, with other creditors, is protected by the trustee in bankruptcy, who represents all creditors."

The interest of petitioners is protected by the trustee (i. e. the debtor in possession).

In 1775 *Broadway Corporation* (C. C. A. 2), 79 F. 2d 108, the debtor was the Broadway Corporation. The claims asserted were against the Manufacturers' Trust Co. for misrepresentation in selling certain notes. The Court pointed out that:

> "Claims arising from misrepresentation in the sale of notes were not claims against the debtor or its assets nor claims that must be settled in order to bring property into the reorganized company * * *"

There is nothing in the case analogous to the case at bar.

In *Diversey Bldg. Corp.* (C. C. A. 7), 86 F. 2d 456, 457, the question was whether a District Court had power to release a guarantor from his guaranty of a bond issue of a debtor in reorganization by reason alone of the debtor, not the guarantor, being in the bankruptcy court. The case is not in point with the case at bar.

Conway v. Bonner (C. C. A. 5), 100 F. 2d 786, was a suit by a trustee to recover from a director of bankrupt certain shares of stock in other corporations obtained by director in exchange for the directors shares of stock in the bankrupt. The court followed the Texas law and found the corporation not insolvent at the time of the exchange.

The Court then said:

> "It follows that appellant has not sustained his alleged right of recovery in the right of the creditors."

This opinion indicates accord with the decision at bar and not conflict as petitioners assert.

Petitioners Contentions Without Merit

The Circuit Court of Appeals for the sixth circuit has decided against the petitioners the same contentions they make here.

In *Gochenour, et al. v. Cleveland Terminals Building Co.* (C. C. A. 6), decided March 3, 1941, petitioners and two other creditors of Terminals filed a motion in the bankruptcy court asking that a restraining order entered at the time of the bankruptcy adjudication be modified to the extent that said creditors could continue to prosecute an action therefore commenced in the Common Pleas Court of Cuyahoga County, Ohio, which sought to recover damages from the directors of Terminals for alleged misfeasance and fraud in the management of the affairs of the corporation.

The Court referred to the present action which was instituted in Indiana, and then said in respect thereof, that:

"The grounds for recovery and relief prayed were identical with those asked in their action in the District Court."

In holding that the alleged cause of action sought to be asserted by Gochenour and others was an asset of the corporation and thus passed to the trustee, i. e. debtor in possession, the Court said:

> The right of action of a corporation to recover damages because of the misconduct and neglect of duty of a corporate officer passes to the trustee of a bankrupt corporation. Officers of corporations, although not responsible for errors of judgment, are fiduciaries charged with the duty of caring for its property and of managing its affairs honestly and in good faith. If this duty has been so violated as to result in the impairment of assets, or loss of property, or an officer, by misconduct, makes a profit for himself at the expense of the corporation, he may be compelled to make full restitution (*Geddes v. Anaconda Mining Co.*, 254 U. S. 590, 599; *Irving Trust Co. v. Deutsch*, 73 F. (2d) 121 (C. C. A. 2), and as the corporation could have maintained a suit for reimbursement from its officers for misconduct, the right of such an action was an asset of the company and passed to the trustee in bankruptcy.
> * * *
>
> Authority for a creditor to bring suit to recover property or rights of property of a corporation in bankruptcy reorganization under any circumstances is not found in the Act. Pending such proceedings, the assets of the debtor are in *custodia legis* and neither it, nor its creditors, has any right to sue on its behalf except as directed by the court. (*Glenny v. Langdon*, 98 U. S. 20, 30.)
>
> The remedy of a creditor, if aware of the existence of property or credits which should rightly go to the debtor for the benefit of creditors, is to inform the court of the facts and request that the trustees or debtor be required to proceed by suit

if necessary to recover the property. *Trimble v. Woodhead*, 102 U. S. 647, 650."

It is clear that the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the instant case announced the well settled applicable legal principles universally accepted.

It is respectfully submitted therefore that petitioners' petition for a writ of certiorari should be denied.

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
EVERETT WARNER,
Counsel for Respondents.
George and Francis Ball Foundation,
George A. Ball and F. B. Bernard.

THOMPSON, O'NEAL & SMITH,
1350 Consolidated Building,
Indianapolis, Indiana,

WARNER, CLARK & WARNER,
Muncie, Indiana,
Of Counsel.